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May 4, 1998

Via Messenger

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

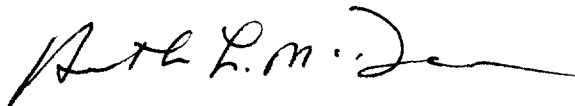
Re: CC Docket 95-155 - Joint Petition for Reconsideration

Dear Ms. Salas:

Enclosed for filing please find an original and 11 copies of the Joint Petition for Reconsideration, submitted jointly by The Direct Marketing Association and the American Car Rental Association. We are also providing an additional copy, which we ask that you kindly date-stamp and return to the messenger.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Heather L. McDowell

cc: T. Power
J. Casserly
K. Martin
K. Dixon
P. Gallant
R. Metzger
A. Gomez
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Before the
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MAY - 4 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

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CC Docket No. 95-155

Toll Free Service Access Codes

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JOINT PETITION FOR RECONSIDERATION

Respectfully submitted by:

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May 4, 1998

SUMMARY

The Direct Marketing Association ("The DMA") and the American Car Rental Association ("ACRA") jointly petition the Commission to reconsider its decision to release vanity and branded toll-free numbers in the 877 service access code ("SAC") on a first-come, first-served basis. The first-come, first-serve approach does not ensure that numbers are fairly or equitably distributed to *anyone*, and certainly does not protect incumbent toll-free subscribers who have devoted enormous resources to market their numbers to maximize reputation and brand recognition. Moreover, the Commission's approach invites and rewards number warehousing, hoarding, and brokering.

The *Fourth Toll-Free Order* offers no rational basis for rejecting a limited right of-first-refusal plan and Petitioners request that the Commission reconsider its *Fourth Toll-Free Order* and adopt a right-of-first-refusal system. At a minimum, the Commission must modify its first-come, first-serve scheme to ensure that incumbent subscribers of vanity and branded numbers have appropriate and meaningful recourse when they are victimized by number brokering. Accordingly, Petitioners seek a modification of the *Fourth Toll Free Order* to clarify that when an incumbent subscriber of a vanity or branded number establishes that another party is hoarding, warehousing, or attempting to broker an complementary toll-free number, the subject number (e.g., 800, 888, 877, or 8XX) must be assigned to the complaining incumbent subscriber.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	CC Docket No. 95-155
Toll Free Service Access Codes)	

JOINT PETITION FOR RECONSIDERATION

Pursuant to section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, The Direct Marketing Association ("The DMA") and the American Car Rental Association ("ACRA") hereby jointly petition the Commission to reconsider its decision to release vanity and branded toll-free numbers in the 877 service access code ("SAC") on a first-come, first-served basis.^{1/} The phrase "first-come, first-serve" is a complete misnomer. The aftermath of the general release of 877 numbers illustrates what the Petitioners have predicted all along: These rules do not work. The first-come, first-serve approach does not ensure that numbers are fairly or equitably distributed to *anyone*. They certainly do not protect incumbent toll-free subscribers who have devoted enormous resources to market their numbers to maximize reputation and brand recognition. Moreover, the Commission's approach invites and rewards number warehousing, hoarding, and brokering. At the very least, the Commission must modify its first-come, first-serve scheme to ensure that incumbent subscribers of vanity and branded

^{1/} In Re Toll Free Service Access Codes, *Fourth Report and Order and Memorandum Opinion and Order*, __ FCC Rcd. __, CC Docket No. 95-155 (Adopted March 27, 1998; Released March 31, 1998) ("*Fourth Toll-Free Order*").

numbers have meaningful recourse when a subscriber or other entity attempts to broker a complementary number in 877 or other SACs.

I. THE COMMISSION'S REJECTION OF RIGHT-OF-FIRST REFUSAL ALTERNATIVES WAS UNSUPPORTED AND ARBITRARY

The Commission has recognized that vanity and branded toll-free numbers are extremely valuable, particularly to those who have expended considerable resources to promote them.^{2/} Yet, the *Fourth Toll-Free Order* abdicates rather than fulfills the Commission's responsibility to ensure the fair, efficient, and orderly administration of these numbers. Events following the release of 877 numbers on April 5, 1998, have proven that the Commission's blind reliance on a "first-come, first-serve" scheme for the distribution of toll-free numbers is wrong. As The DMA predicted, the first-come, first-serve approach has resulted in chaos.^{3/} Competitors, carriers, and would-be brokers have scrambled to reserve the most valuable, best recognized toll-free number sequences. Vanity and branded numbers have gone to RespOrgs who want the competitive advantage of being able to offer certain vanity numbers to the luckiest of their actual or potential subscribers, or to those with the greatest influence over their RespOrg. In some cases, numbers have been lost or gained based on computer capabilities and computer search logic. It can safely be

^{2/} See, e.g., *Fourth Toll-Free Order* at ¶¶ 2, 11

^{3/} See, e.g., "Firms Scramble for New Toll-Free Code", DM News, April 13, 1998 (attached hereto for convenience as Attachment A).

predicted that no small percentage of the prized numbers released in this fashion will, despite the Commission's anti-brokering rules, ultimately have to be purchased by the incumbent number holder.

The *Fourth Toll-Free Order* reflects the Commission's reliance on patently incorrect assumptions about a right-of-first-refusal plan, and a naive and misplaced optimism that abuses of what purports to be a first-come, first-serve system are all solved by the anti-brokering and anti-warehousing rules.

Petitioners had proposed that the incumbent subscriber of a vanity or branded number in the 800 service access code (SAC) be afforded a right-of-first-refusal to reserve the complementary number in subsequent SACs. The incumbent subscriber would also be able to release a complementary number into the general pool of available numbers on condition that the number not be used or advertised with a particular acronym. Although these rights reasonably could extend to all SACs, Petitioners acknowledge that affording priority rights through at least 877 would also be a fair balance of competing interests and needs.^{4/}

The Commission evidently misunderstood The DMA's proposal for right-of-first-refusal, suggesting that it would escalate number exhaust. This is incorrect. For some vanity 800-number subscribers, the only reasonable and realistic way to protect their interests is to subscribe to the 888 and 877

^{4/} See Letter to FCC Chairman William E. Kennard from Ian D. Volner, Counsel to the Direct Marketing Association (April, 1998).

complement. Many others, however, have no interest in securing additional numbers as long as they have a workable means to ensure that other subscribers can not use an 888 or 877 complement in a deceptive or misleading way, and trade off the incumbent subscribers' reputations, name or brand recognition, images, trade or service marks, copyrights, or other property. As long as these incumbent subscribers are able to protect their investment, they have an incentive *not* to reserve extra numbers. The Commission's assertion that a limited right-of-first-refusal, as outlined by The DMA, would promote number exhaust simply misunderstands or ignores the specific proposal that was advanced.

The Commission is also incorrect when it states that a right-of-first-refusal approach conflicts with the Commission's view that toll-free numbers are a public resource not subject to "ownership,"^{5/} and would enable subscribers to "minimally use" a number simply to prevent a competitor from obtaining it.^{6/} Furthermore, there is absolutely nothing in the Commission's putative first-come, first-serve system to prevent such "minimal use." Indeed, what the rational broker will do under the Commission's first-come, first-serve system is to capture a prized number and put it into "minimal use" without the acronym until it can be sold to the incumbent user or the highest bidder.

^{5/} *Fourth Toll Free Order* at ¶20.

^{6/} *Fourth Toll Free Order* at ¶ 17.

The *Fourth Toll-Free Order* also states that under a first-come, first-serve scheme, subscribers will have less incentive over time to strategize to reserve complementary numbers in new SACs because consumers will become more familiar with the existence of multiple SACs.^{7/} The Petitioners agree. That is not, however, a basis for ignoring the rights of incumbent subscribers. The same motivations will hold true for subscribers' desire to exercise a right-of-first-refusal -- the incentive and need will generally diminish as time passes, which is why it may be possible to limit the right-of-first-refusal to the first two or three new SACs. Yet, a mechanism must be in place to safeguard the rights of those who need protection until time passes. The Commission cannot have it both ways: Vanity-number subscribers' continuing or waning interest in complementary toll-free numbers will be no different under first-come, first-serve than under right-of-first refusal.

The Commission also wrongly suggests that affording priority rights to incumbent subscribers carries a risk of granting a right-of-first-refusal to multiple subscribers for the same number. Under the "use-or-lose" approach Petitioners advocate, that would not be possible. Subscribers who did not exercise their right in one SAC would waive it in all future SACs. For instance, if the incumbent holder of 800-123-4567 did not exercise its priority right to subscribe to 888-123-4567, it would waive its right-of-first-refusal in 888, 877, and all subsequent

^{7/} *Fourth Toll-Free Order* at ¶ 23.

SACs. Hence, the illustration the Commission offers in footnote 43 of the *Fourth Toll Free Order* could never occur. It is true that an 800-number subscriber could relinquish its priority right to subscribe to the complementary 888 number on condition that the 888 complement would not be marketed with a specific acronym. Thus, there certainly would be a reduction in the use of acronyms associated with a particular number, but no acceleration of number exhaust.

The Commission's final criticism of the proposal advanced by incumbent vanity number holders is that "any system involving a right of first refusal inherently means that certain numbers will be unavailable to other toll-free subscribers." ^{8/} Yet, under *any* system, "certain numbers will be unavailable to other toll-free subscribers"; only one person or entity can subscribe to a single number no matter what system of assignment the Commission employs. To the extent that the Commission intended only to refer to the availability of a discrete set of vanity numbers subject to incumbent subscribers' priority rights, it still has failed to explain why that is not the most rational approach. Incumbent vanity number holders, not "other toll-free subscribers," have made extraordinary investments in advertising their numbers and affiliated acronyms, brands, or phrases.

While the Commission purports to address issues of "fairness," the *Fourth Toll-Free Order* speaks only to the concerns of prospective 877 subscribers, not

^{8/} *Fourth Toll Free Order* at ¶ 18.

the unfairness to incumbent subscribers.^{9/} The Petitioners want fairness for both. Only 374,199 numbers in the 888 SAC were set aside at the request of vanity number subscribers^{10/} - a mere .05% of the roughly 7.7 million numbers available in each SAC. *Vanity number subscribers are not causing the rapid depletion of toll-free numbers.* Yet, they more than any other toll-free subscriber, and perhaps they alone, will suffer the economic harm and loss that will result from adopting first-come, first-serve plan for assigning 877 numbers.

Nor can the Commission explain why its first-come, first-serve system is “fair” even to prospective subscribers. In fact, the system is not “first-come” at all. The determination of which subscriber gets to use the number is not based on the date on which contesting potential subscribers have requested the number, it is based solely on the moment in time in which a particular RespOrg “finds the number” available in the database and reserves it. Although RespOrgs are deemed to have certified that they have an identified subscriber who agrees to be billed when they reserve a specific number or numbers, there is nothing to prevent a RespOrg from seeking one or more numbers for one individual subscriber (at the subscriber’s request), and then offering reserved but unused

^{9/} *Fourth Toll Free Order* at ¶¶ 26-28.

^{10/} *Fourth Toll-Free Order* at ¶9. Even if it is conceivable that, due to flaws in the 888 set-aside procedures, the 374,199 figure understates the quantity of numbers that vanity subscribers would have preferred to set aside, chaotic attempts to subscribe to 877 in the wake of the *Fourth Toll Free Order* make plain that first-come, first-serve does not facilitate a more accurate count or more orderly reservation and assignment of toll-free numbers. It also would not alter the fact that the 800 SAC served well for roughly 30 years despite the use of vanity numbers. Rather, the dramatic increase in the demand for toll-free numbers appears to coincide with a rise in the use of pagers.

numbers to third parties, as long as those third parties also have "agreed to be billed." Yet, the RespOrgs cannot be faulted for the Oklahoma Land Rush that ensued when the 877 numbers were released on April 5 1998.^{11/} The Commission, and only the Commission, is to blame. The mistaken notion that first-come, first-serve is both even-handed and orderly is the direct and proximate cause of the chaos that ensued and continues with respect to vanity numbers in the 877 SAC.

Merely tossing these issue to the courts^{12/} betrays the Commission's responsibility in the number reservation process in two respects. First, even in the trademark and unfair competition context, such disputes would largely center on the use of a public resource that is controlled by this agency: The Commission controls access to the tool that will facilitate the very disputes this Commission then suggests are better addressed in the courts.

Second, the Commission's abdication to the courts of responsibility for preventing abuses of its toll-free number distribution system simply ignores the fact that only the Commission can enforce the anti-brokering rules.^{13/} Even if the Commission intended by its adoption of those rules to create a private cause of action justiciable by the courts, it is doubtful that the Commission has the

^{11/} See Attachment A.

^{12/} *Fourth Toll Free Order* at ¶ 27 (suggesting that incumbent subscribers have recourse to the courts to resolve trademark claims).

^{13/} See, e.g. 47 C.F.R. §§ 52.105, 52.107.

statutory authority to do so. Thus, the only recourse for a victim of brokering is to go to the Commission. The Commission apparently has assumed that these rules work. In fact, the rules are toothless. The Commission's reliance on the anti-brokering rules as a justification for invoking a putative first-come, first-serve system is naive at best.

The Commission cannot hand unscrupulous marketers the means to engage in deception and other illegal conduct but offer no remedy to those who will be harmed. A right-of-first-refusal system is the most rational means to achieve the Commission's goal of ensuring the fair, efficient, and orderly distribution of toll-free numbers. It will avoid the harmful effects of deliberate and accidental consumer confusion, and it is the best means to balance the importance of maximizing the widespread availability of a public resource and the need to protect current subscribers. Because the Commission had no reasoned basis for rejecting this approach, and every reason to know that first-come first serve would inevitably fail, it should reconsider its *Fourth Toll Free Order* and adopt the right-of-first-refusal plan the Petitioners have proposed.

II. THE COMMISSION'S RULES FAIL TO PROVIDE A REMEDY FOR SUBSCRIBER'S THREATENED BY NUMBER BROKERING

If the Commission adheres to a first-come, first-serve policy for numbers in the 877 SAC or any future SAC, it must -- at the least -- establish a remedy to protect incumbent vanity and branded number subscribers from toll-free number brokering. The Petitioners thus ask the Commission to modify its *Fourth Toll Free Order* to clarify that when an incumbent subscriber of a vanity or branded

number establishes, through a complaint before the Commission, that another party is hoarding, warehousing, or attempting to broker a complementary toll-free number, the subject number (e.g., 800, 888, 877, or 8XX) will be assigned to the complaining incumbent subscriber. For example, if Subscriber A, who holds 800-123-4567, establishes that Broker X has attempted to sell 888-123-4567, then the number 888-123-4567 must be assigned to Subscriber A, if requested.

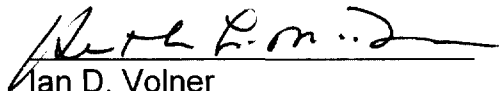
Although the Petitioners generally support the FCC's anti-brokering standards,^{14/} those rules will not effectively deter warehousing, hoarding, or brokering unless the Commission commits to: (1) aggressively enforce the rules; and (2) offer substantial recourse to subscribers so that filing a complaint is worthwhile. To assume that subscribers will routinely complain about brokering rather than pay for a number underestimates the marketability of vanity numbers. The core shortcoming of the anti-warehousing hoarding and brokering rules is that the Commission has not fashioned any meaningful remedy. While, in theory, the present rules enable the Commission to require the RespOrg to take back the number from the offending broker and put it into the general pool, the prospect that the complaining subscriber -- the victim of the brokering attempt -- will actually later secure the number for its own use still remains dependent upon the vagaries of the first-come, first-serve system. The Commission should not be surprised that there have been very few complaints under the anti-brokering

^{14/} 47 C.F.R. §§ 52.105, 52.107

rules. Given the extraordinary value of vanity numbers, and the danger that the broker will take a desired number to a competitor or simply sell it to the highest bidder, sound business sense counsels the victim simply to pay the blackmail in order to protect itself.

The Commission, therefore, must afford a *meaningful* remedy for businesses and others who have invested substantial sums to promote their current 800 numbers, and in newly released 888 numbers, when unscrupulous subscribers seek to capitalize on, or create, confusion among toll-free users as new toll-free SACs are introduced. Requiring that a particular number be assigned to a complainant who demonstrates that it has been victimized by brokering will help achieve that goal.

Respectfully submitted,



Ian D. Volner

Heather L. McDowell

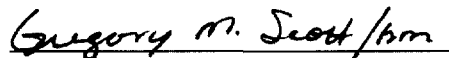
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May 4, 1998

Firms Scramble for New Toll-Free Code

Some say they lost vanity numbers in FCC's first-come, first-served allocation

By Denise Duclaux

Some industry insiders rose as early as 3 a.m. a week ago Sunday to jockey for the 877 equivalents of certain vanity numbers, but they could have hit the snooze button a few times and still had the same results.

The third nationwide toll-free code, 877, debuted at noon CST April 5, joining its 800 and 888 counterparts. For the 888 numbers, which launched in 1996, the Federal Communications Commission granted vanity number subscribers the right of first refusal,

or the opportunity to turn down their 888 equivalents, before competitors snatched them up.

But for the 877 numbers, the FCC decided that they and any toll-free code after them would be doled out on a first-come, first-served basis. This would ensure that "subscribers would be given an equal opportunity to reserve desirable toll-free numbers as new codes are opened," the FCC said.

Some subscribers had long suspected that the FCC would make such a ruling and already had contacted their RespOrgs, or toll-free service providers, to prereserve their 877 equivalents.

Other companies quickly followed suit after the Direct Marketing Association alerted its members to secure their 877 equivalents in light of the FCC ruling.

Early on April 5, RespOrgs logged into the Service Management System (SMS) database, the central computer system that allows RespOrgs to reserve toll-free numbers and maintain toll-free records. The RespOrgs wanted to ensure that they were linked to the SMS database. But many discovered that a link to the database didn't mean smooth sailing.

"I had three RespOrgs put in a request on my behalf on Sunday right at the moment of release of the 877 numbers," said Loren C. Stocker, a managing partner of Vanity International, a Chicago-based consultancy. "All three of them got locked out of the system for at least 10 minutes, some even got locked out for as much as 40 minutes."

The SMS/800 Numbering Administration Committee (SNAC), which creates guidelines for the administration of SMS, set up a conference call for RespOrgs to discuss reservation problems.

"Just about everybody speaking [on the conference call] was saying they were essentially [frozen] and basically had reserved almost nothing," said David Greenhaus,

president of RespOrg The Long Distance Partnership, Burlington, VT. "Then someone said they had just spoken with the SMS people and they said they were showing 10,000 numbers had been reserved. Everybody at that point was wondering who reserved 10,000 numbers when we were all [frozen]."

Stocker speculated that a RespOrg entered a large batch file into the SMS database, causing the other RespOrgs to wait

**FCC promised
'an equal
opportunity to
reserve desirable
toll-free numbers.'**

while its numbers were serviced.

"I think the truth of the matter was that the system screwed up immensely," Stocker said. "The system should have serviced everybody and not just serviced this big file. It's like a stadium performance. Everybody is in line and you are number eight. All of a sudden you get up to the gate, and they hold you there while the guy up ahead of you has 10,000 of his closest friends come in."

Greenhaus said the computer links of some RespOrgs freed up before others, enabling them to reserve what was left of their lists of preferred numbers first.

Stocker, who lost the 877 number he most wanted to AT&T, has sent a letter to the FCC saying that the first-come, first-served process did not promote "the efficient, fair and orderly allocation of toll-free numbers," as the FCC said it would.

"I was denied service at the most critical 10 minutes in the history of toll free,"

Stocker said. "This was an unconscionable outcome. We believed that this was the moment that our property was purported to be available on a first-come, first-served basis, and we were locked out."

Steve White, president of Response-Trak Call Centers, Waldoboro, ME, which manages 200 toll-free numbers for itself and customers, has sent a letter to the FCC and filed a motion with the U.S. Court of Appeals urging them to freeze activation and any further assignment of the numbers. He contended that the numbers were unfairly distributed even before the RespOrgs tried to log into the SMS database.

"Let's say a subscriber submitted an 877 request to MCI in December 1997 and another subscriber submitted the same request to AT&T in February 1998," White said. "If at the appointed hour there was the inability of some RespOrgs to get into the database, then isn't it possible that a subscriber who submitted a request on April 1 could get that 877 number?"

White has another problem with the manner in which 877 numbers were distributed, noting that some RespOrgs may have a conflict of interest.

"AT&T has its first allegiance to its shareholders," he said. "As a subscriber of record to toll-free numbers, it isn't likely that AT&T would put my request ahead of its own request under the present system. Is that first come, first served? No, it's the big boys first and the rest of us later."

On April 2, the DMA filed an emergency petition requesting that the FCC "immediately, but temporarily" stay the application of its new rules regarding toll-free numbers.

"We said that first come, first served was not a good answer," said Jerry Cerasale, DMA's senior vice president of government affairs. "If [RespOrgs] were frozen out, that means that lots of people didn't have a chance to get numbers. So maybe at least something better could be done for the distribution of 866 numbers."

At the current rate of consumption of toll-free numbers, officials expect the fourth toll-free code, 866, to be introduced sometime in late 1999. ■